Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STANLEY C. MOWRY, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents an important issue of law involving the burden of proof in a wrongful termination action and the dangerous precedent established by the Tenth Circuit. The Tenth Circuit deviated from this Court's and other jurisdictions in applying the burden of proof and persuasion in a wrongful termination when based upon the defense of a public policy and safety issue at the summary judgment stage. Such a different standard by the Tenth Circuit is clearly against public policy and will only cause employees to put their lives at risk in order to accomplish their scope of employment. There should have existed a balancing act to justify the Petitioner's act versus the Employer's interest. These material disputed facts should have overcome summary judgment.

The lower courts set up an impossible burden of proof for any employee claiming a public policy discharge when multiple supervisors claim events different from what is later proven to be accurate. Under the lower courts' standard, no amount of objective evidence can bring this issue to the jury without an admission of wrongdoing on the part of the Employer. Such unfair burden is unconstitutional and a violation of the Petitioner's due process.

Thus, the Writ should be granted to address these salient issues.

I. WHETHER THE LOWER COURTS DEVIATED FROM SUPREME COURT CASES AND FRACTURED THE LAW OF A BURDEN OF PROOF IN A WRONGFUL TERMINATION CASE AND ERRONEOUSLY GRANTED THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SINCE THERE EXISTED MATERIAL ISSUES OF DISPUTED FACTS THAT SHOULD HAVE BEEN RESOLVED BY A TRIER OF FACT IN VIOLATION OF THE CONSTITUTION?

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The United States Court of Appeals for the Tenth Circuit's decision dated May 29, 2008 and affirming the District Court's decision is set forth in the Appendix. (1a-17a). The decision of the United States District Court for the District of Colorado dated March 5, 2007, which decision originally granted the Employer summary judgment and dismissed the Petitioner's complaint is set forth in the Appendix. (18a-23a).

A Petition for Rehearing En Banc with respect to the earlier decision was denied on July 2, 2008. See Appendix. (24a).

This Writ is timely filed within the applicable time period as well as the enlargement of time granted by the Court.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Tenth Circuit issued its final decision on May 29, 2008. A Petition for Rehearing En Banc was denied on July 2, 2008. This Petition is timely filed.

RELEVANT PROVISIONS INVOLVED

Seventh Amendment, United States Constitution

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not

> fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Fourteenth Amendment, United States Constitution

> The Due Process Clause of the Fourteenth Amendment provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law...."

Fed.R.Civ.P. 56 (Summary Judgment)

Rule 56(c) states in pertinent part that summary judgment will be granted only:

> If the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

STATEMENT

Procedural History

The Petitioner, Stanley C. Mowry, (hereinafter the "Petitioner"), was an employee of the Respondent, the United Parcel Service, Inc., (hereinafter referred to as the "Employer").

The Petitioner filed a complaint alleging wrongful termination in the United States District Court for the District of Colorado via diversity

jurisdiction under 28 U.S.C. §1291. (2a). The Employer filed a Motion for Summary Judgment which was allowed on March 5, 2007. (18a-23a).

Thereafter, the Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit. On May 29, 2008, the Tenth Circuit affirmed the District Court's decision. (1a-17a). Also, the Tenth Circuit denied the Petitioner's Petition for Rehearing on July 2, 2008. (24a).

The Petitioner seeks relief by timely filing this Petition for Writ for Certiorari.[1]

Facts

This is a case in which the Petitioner alleged wrongful termination against the Employer based on the Petitioner's defense that his acts were in accordance with public policy.

The Petitioner was employed as a full-time hourly-paid "feeder driver" for the Employer for over five years. The Petitioner was responsible for driving package trailers between Commerce City, Colorado and other centers.

The Petitioner was a member of the International "Brotherhood of Teamsters", and his employment was governed by a collective bargaining agreement between the Employer and the Teamsters. The agreement provided that union employees could

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[1] The Petitioner's Motion for Enlargement of Time to file Writ of Certiorari was granted by the Court.

not be discharged in the absence of "just cause," including dishonesty. Even though the Petitioner was cited for several performance violations, all of those performance violations were found to be groundless or frivolous through the grievance process or reversed by a grievance panel after a hearing. The Petitioner was never terminated. In October of 2001, the Employer told the Petitioner that he needed to contact the Employer's dispatcher if he was going to be more than fifteen minutes late or else he could receive a formal discipline.

On the night of April 26 and the morning of April 27, 2002, the Petitioner drove his regular round-trip route between Commerce City, Colorado and Rawins, Wyoming. On his return trip, he stopped at a rest area due to inclement weather resulting in hazardous road conditions. In fact, a semitrailer had fell over across the highway due to the perilous road conditions. The Petitioner claims that the wind, snow, ice and heavy fog made it too dangerous to operate a semi-trailer until conditions improved. In fact, when the Petitioner entered the rest area, the parking lot was full due to other semi-trailers stopping for the same reason.

However, the Petitioner did not notify the Employer of the delay. Nonetheless, the Employer had two supervisors following the Petitioner on that evening and both acknowledged that a semi-trailer had rolled over on the highway and that the road was slushy and wet. Even given the driving conditions, the Employer determined that the Petitioner made an unauthorized stop, of course concluding that their service was more important than the lives of the

Petitioner and the lives of other drivers' on the highway.

The Petitioner recommenced his trip at approximately 6:00 a.m. and arrived at the terminal at approximately 9:00 a.m. There were no other employees at the terminal at this time.

At the time of the alleged incident, the Petitioner's supervisor (and Division Manager) was Gregg Ford. Mr. Ford concluded after speaking to the other two supervisors and reviewing the computer that the Petitioner should have been able to travel on the slushy wet highway. Mr. Ford concluded that the Petitioner's stop was excessive in duration and that the Petitioner was dishonest regarding his travel. Thus, the Employer discharged the Petitioner for allegedly being dishonest. The Petitioner was not given the opportunity to explain the travel two nights before.

Then the Petitioner filed a grievance with the union reaffirming that he had stopped to wait out a storm that caused adverse road conditions, including high winds, fog, ice and snow.

In his complaint filed in Colorado state court, the Petitioner alleged that his supervisor/Division Manager, Gregg Ford, terminated his employment because he pulled his commercial vehicle off the road during adverse road and weather conditions, as required by federal and state regulatory law. The complaint challenged the termination on four grounds:

1) public policy discharge; 2) wages and compensation[2]; 3) retaliatory discharge[3]; and 4) and intentional infliction of emotional distress.[4]

The Employer removed the case to federal court based on diversity of citizenship.

The Petitioner refers to the procedural history for further factual background.

As a result, the Petitioner commenced the underlying action.

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[2] This issue was settled in the Second District of California where 20,000 employees were awarded $87 million in a class action lawsuit (*Cornn, et. al. v. UPS* (April 12, 2007)).

[3] The Petitioner's claim for retaliatory discharge was based upon the evidence in the record that Mr. Ford began to make working conditions intolerable for the Petitioner after the later raised the issue with Mr. Ford and the Employer of the illegality of altering employees' time cards. Moreover, the Petitioner testified on behalf of sexual assault victims against the wrongdoer and Employer.

[4] The District Court dismissed the second and third causes of action.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS DEVIATED FROM SUPREME COURT CASES AND FRACTURED THE LAW OF A BURDEN OF PROOF IN A WRONGFUL TERMINATION CASE AND ERRONEOUSLY GRANTED THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SINCE THERE EXISTED MATERIAL ISSUES OF DISPUTED FACTS THAT SHOULD HAVE BEEN RESOLVED BY A TRIER OF FACT IN VIOLATION OF THE CONSTITUTION.

This Honorable Court's review is necessary to resolve the issue of the burden of proof at the summary judgment stage in a wrongful termination case when there has been genuine material disputed facts of the Employer's failure to investigate the facts when an employee complied with federal or state safety regulations.

The Petitioner created genuine issues of material facts for the cause of action of tort under Colorado law. The lower courts failed to use the proper standard of review and assess all factual evidence and draw all reasonable inferences in favor of the Petitioner. *Rost v. Steamboat Springs*, 511 F.3d 1114, 1119 (10th Cir. 2008); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 6512, 657 (6th Cir. 2000).

Since this case was one determined on summary judgment and there were disputed material facts, at minimum the facts and inferences should have been weighed in the Petitioner's favor, this case should have been determined by a trier of fact. Fed.R.Civ.P. 56. The issues of whether the Employer's reason for

termination was non-discriminatory and/or with cause and whether the Petitioner submitted evidence to meet his burden that the alleged purpose of termination was not true should have been weighed by a jury.

When considering whether to grant summary judgment, the Court should have determined whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In making this assessment, the Court must "accept all reasonable inferences favorable to the nonmovant." *Feliciano v. State of Rhode Island*, 160 F.3d 780. 788 (1st Cir. 1998). In deciding whether a factual dispute is "genuine," the Court must determine whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*; *see also Fajardo Shopping Center, S.E. v. Sun Alliance Ins. Co. of Puerto Rico, Inc.*, 167 F.3d 1, 7 (1st Cir. 1999); *De-Jesus-Adorno v. Browning Ferris Indus. Of Puerto Rico*, 160 F.3d 839, 841-842 (1st Cir. 1998) ("A trial worthy issue exists... [if] the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'"); *Feliciano* at 784; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S.Ct. 2548 (1986). In weighing whether a factual dispute is "material," the Court must examine the substantive law of the case, because "only disputes over the facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Anderson* at 248; see also *De-Jesus-Adorno* at 841-42 ("A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the

outcome of the litigation under the governing law.") In our facts, trialworthy disputed material facts existed, that is, whether the Employer had to have actual knowledge of the hazardous condition prior to the Petitioner complying with federal or safety regulations. The District Court and Tenth Circuit erred in concluding that the Petitioner failed to offer evidence that: "Ford knew, or reasonably should have known, at the time he terminated Mowry's employment that Mowry believed he was complying with federal or state safety regulations".

The Petitioner did not notify the Employer of the delay. The video testimony of the eye witness verified that the phone at the rest area was a cell phone and it did not work. In addition, the Employer had two supervisors following the Petitioner on that evening (a common practice by UPS) and both acknowledged that a semi-trailer had rolled over on the highway and that the road was slushy and wet. The latter statement contradicted the two supervisors' previous statement under oath at the Petitioner's grievance panel hearing. Those statements included that the roads were clear and dry, it was perfectly calm, the stars were out, there was no fog, and weather was not a factor. The video testimony of the Wyoming state trooper, Jason Green, as well as the eye witness at the rest area, Joe McGuire, contradicted the supervisors' remodeled statement, and testified that the conditions were extremely bad.

There were genuine issues of material disputed facts that should have been weighed by a jury. The salient facts of the road condition, the cause of the semi-trailer to roll over, the weather, and the driving scenario on that particular evening were disputed –

whether the road conditions were perilous to cause the Petitioner to stop driving for a period of time were questions for a jury and sufficient to overcome the summary judgment standard. The District Court and Tenth Circuit erred in concluding that the Petitioner had failed to raise a genuine issue of material fact as to whether the Employer and/or Mr. Ford were aware or should have been aware, at the time of the termination of the hazardous road conditions, to justify the Petitioner's parking of the semi-trailer. The very basis of the issue is a material fact.

Furthermore, the burden of notice either actual or constructive should have been upon the Employer. As a reasonable person, the Petitioner did not begin to raise weather conditions while being discharged for alleged dishonestly. Furthermore, there is a material disputed fact as to whether the Employer was actually on notice since the Employer had two of its supervisors follow the Petitioner and acknowledged the perilous driving conditions and the fallen semi-trailer on the road. At the summary judgment stage, the Petitioner met his burden of proof.

Since the Tenth Circuit should have reviewed the summary judgment de novo, the appeals court should have found in favor of the Petitioner. *See Media News Group, Inc. v. McCarthey,* 494 F.3d 1254, 1260 (10th Cir. 2007).

Public policy mandates a review of the lower courts' decisions. At the summary judgment stage, there should have been a review of the disputed facts of the Petitioner's act versus the Employer's interest. Nonetheless, the disputed facts should have been

reviewed by a jury. Summary judgment is erroneously granted if reasonable persons might reach different conclusions regarding the facts. *Exnicious v. U.S.*, 563 F.2d 418 (10th Cir. 1997).

In our facts, it is apparent that the intent and motive to discharge the Petitioner were in opposite to the explained reasons. Determinations of motive and intent are questions better suited for the jury. *Proschaska v. Marcoux*, 632 F.2d 848 (10th Cir. 1980), *cert. denied*, 451 U.S. 984, 101 S.Ct. 2316 (1981); *Petitti v. New England Telephone and Telegraph Co.*, 909 F.2d 28, 34 (1st Cir. 1990). Despite the evidence that the Petitioner entered inclement weather into the IVIS system and the admission by the Employer that Mr. Ford had reviewed the IVIS log prior to discharging the Petitioner, but should have also discussed the findings of the other two supervisors watching the Petitioner, the lower courts erroneously determined that the record did not reveal that the Petitioner stated the reason why he stopped during his return trip. In fact, the Petitioner offered the supporting evidence of another driver who stated he experienced treacherous road conditions that evening and it was dangerous for trucks to be driving. Such overwhelming evidence should have determined that reasonable persons would have concluded a different result. Drawing all inferences in favor of the Petitioner, the lower courts should have concluded that the Petitioner input poor weather conditions into the IVIS system, as verified by independent witnesses including the Employer's own employees, that the Employer and Mr. Ford had some form of notice of the actual conditions.

The lower courts erroneously concluded that the Petitioner did not notify Mr. Ford of the weather conditions at the time of the termination. However, no consideration was given to the fact that the Employer had two supervisors following the Petitioner – both who had acknowledged the weather conditions and a rolled over semi-trailer. There exists a disputed material fact of actual notice. Then the Petitioner filed a grievance with the union reaffirming that he had stopped to wait out a storm that caused adverse road conditions, including high winds, fog, ice and snow.

As an experienced driver, the Petitioner knew state regulations. According to 49 C.F.R. §392.14:

> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions...adversely affect visibility or traction...If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued...[5]

Obviously, there exist material disputed facts as to the hazardous conditions to make the commercial vehicle dangerous to operate. However, the lower courts failed to properly apply a standard of notice to the Employer and notice of hazardous conditions. The Employer focused upon the truck's IVIS system, however, there was no option to report to the Employer of hazardous road conditions.

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[5] See also 4 Colo. Code Regs. §723-6 Par. 6102(a)(I) which incorporates by reference 49 C.F.R. Part 392 as a Colorado state regulation.

An impermissible burden of proof was placed upon the Petitioner at the summary judgment stage, especially since all inferences should have weighed in the Petitioner's favor.

Given the burden of proof placed upon the Petitioner to prove the Employer's actual knowledge of hazardous road conditions prior to complying with public safety issues as well as state and federal laws, the Petitioner's due process rights have been violated. At the summary judgment stage, all inferences should have been weighed in the Petitioner's favor to deny summary judgment. If the decisions are upheld, claims, such as that of the Petitioner, where an employee is wrongfully terminated since he needed to make a quick decision to process the Employer's agenda or comply with federal and state regulations, would never reach the jury thereby violating constitutional rights. If the writ is denied, employers only motive would be to make sure their employees complete the duties – the issues of public policy and safety would be of lesser importance. In this instance, the Employer, would have greater power over the applicability of state and federal regulations. To avoid summary judgment for his wrongful termination claim in violation of public policy, the Petitioner was required to adduce sufficient evidence to create a genuine issue of material fact on each element of the tort. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). As stated above, the Petitioner met his burden of proof and to impose a greater burden was a violation of his due process.

In fact, the Petitioner met the four-part prong test to prove wrongful discharge in violation of public policy:

> 1) That the employer directed the employee to perform an illegal act as part of the employee's work related duties...;
> 2) That the action directed by the employer would violate a specific statute relating to the public health, safety or welfare, or would undermine a clearly expressed public policy relating to the employee's basic responsibility as a citizens...;
> 3) That the employee was terminated as the result of refusing to perform the act directed by the employer; and
> 4) That the employer was aware, or reasonably should have been aware the the employee's refusal to comply with the employer's order or directive was based on the employee's reasonable belief that the action ordered by the employer was illegal.

*Martin Marietta Corp. v. Lore*nz, 823 P.2d 100, 109 (Colo. 1992); *Rocky Mount. Hosp. & Med.Serv. v. Mariani*, 916 P.2d 519, 527 (Colo. 1996).

The lower courts erroneously cited that the Petitioner failed to meet the fourth prong. However, at the time that Mr. Ford terminated the Petitioner, the supervisor should have consulted with the two other supervisors who could have verified the hazardous road conditions as well as the tipped over semi-trailer. The Employer did have notice. It is not the fault of the Petitioner that allegedly Mr. Ford, an employee, Division Manager, and servant of the Employer, did not allegedly have actual notice. The issue then should have been actual versus constructive notice. *See W. Diversified Servs., Inc. v. Hyundai Motor Am., Inc.*,

427 F.3d 1269, 1276 (10th Cir. 2005). There is a material disputed fact as to whether the Petitioner was in fact given the opportunity to explain why he had pulled off the highway or that he was being considered for discharge. Under the warning, discharge was not even an option.

The Petitioner was never given the opportunity to present the material facts since judgment was wrongfully entered at the summary judgment stage. The weighing of the public policy via the wrongful termination and the compliance of regulations should have been presented to a jury. By denying the Petitioner access to the courts, his constitutional rights were violated.

So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a "...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* Petitioner's case must fall to the jury in order to preserve his substantive right of the opportunity to be heard. Due Process Clause of the Fourteenth Amendment. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77 L.Ed.2d. 1485 (1999). The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied the

basic constitutional concepts – Petitioner was not given a reasonable opportunity to present his case from an arbitrary or unjust appropriation. Instead his case was dismissed upon a summary judgment because the District Court failed to provide the correct standards of burden of proof and persuasion in a wrongful termination case. There was no investigation as to whether the termination was legitimate in this instance. Under the lower courts' analysis, the Petitioner should rush to an explanation for his actions to cease driving during dangerous road conditions prior to him being fired. The Petitioner was not even aware that there was a question about his conduct. The lower courts automatically set up a high burden of defense of actions. The Petitioner was never afforded the opportunity to speak in defense of his actions. The lower courts also failed to recognize that the independent witness testified to the bad driving conditions and the two supervisors were not driving a trailer so could not conclude as to the danger of driving a trailer on the highway.

In *Hunt v. Cromartir*, 526 U.S. 541 (552 U.S. 1999), this court reminded the lower courts again that before granting a summary judgment, they must not weight evidence and assess credibility of the parties or evidence because that belongs to the jury. In addition, the court noted that "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor." Rather than following this guideline and standard, the lower courts deviated by making findings of facts, assessing credibility of witnesses and evidence and weighing the evidence in light most favorable to the Employer.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a ...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury. Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; if there is no statute then it is a constitutional question. *City of Monterey v. DelMonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999).

Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting

the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Id*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995). The Petitioner's case must fall to the jury in order to preserve his substantive right of the opportunity to be heard of violations of a state regulation.

A review of the District Court's and Tenth Circuit's opinions demonstrate that they deviated from other jurisdictions as well as their own recent and previous decisions. The lower courts heightened the burden for Petitioner to prove a wrongful termination where there was no reasonable legitimate purpose to justify the Employer's acts.

Therefore, the Petitioner respectfully requests that the Writ be granted, or in the alternative, the case remanded so that an evidentiary hearing may be scheduled to resolve the material disputed facts.

CONCLUSION

The United States Court of Appeals for the Tenth Circuit and the United States District Court for the District of Colorado have failed to properly apply the standard to justify the material disputed facts of a wrongful termination when public safety and non-violation of a regulation defend the legitimate act of temporarily performing the scope of employment. The lower courts failed to provide the proper standards of proof. At minimum, inferences should have been weighed in the Petitioner's favor that the Employer's purpose was not legitimate and summary judgment denied. To place a heavier burden than defined under the common law is unconstitutional and a deviation from due process.

Since a trier of fact did not weigh the evidence, the Petitioner's due process rights were violated and he did not get the opportunity to present his claim before a jury.

The Court should grant *certiorari* to review these important matters and prevent these cases to be disposed of on summary judgment.

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(any footnotes trail end of each document)

No. 07-1197

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STANLEY C. MOWRY,
Plaintiff-Appellant,
v.
UNITED PARCEL SERVICE, INC.,
Defendant-Appellee.

May 29, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

JUDGES: Before KELLY, LUCERO, and HARTZ, Circuit Judges.

ORDER AND JUDGMENT *

In this diversity case, Stanley C. Mowry appeals the district court's grant of summary judgment to United Parcel Service, Inc. ("UPS") on his claim that UPS wrongfully discharged him in violation of public policy, a tort recognized under Colorado state law. Specifically, Mowry alleges that UPS supervisor Gregg Ford terminated his employment because he pulled his commercial vehicle off the road during adverse road and weather conditions, as required by federal and state regulatory law. We agree with the district court that Mowry has failed to create a genuine issue of material fact with respect to at least one element of the

alleged tort: He has not advanced evidence that shows Ford knew, or reasonably should have known, at the time he terminated Mowry's employment that Mowry believed he was complying with federal or state safety regulations. Exercising jurisdiction under 28 U.S.C. § 1291, we therefore affirm the district court's grant of summary judgment to UPS.

I

For more than five years, Mowry worked as a full time "feeder driver" for UPS, and was responsible in that capacity for driving package trailers between UPS's hub in Commerce City, Colorado, and various package centers, including the center in Rawlins, Wyoming. Throughout the course of his employment at UPS, Mowry was a member of the International Brotherhood of Teamsters ("Teamsters" or "union"), and his employment was governed by a collective bargaining agreement ("CBA") between UPS and the Teamsters. The CBA provided that union employees could not be discharged in the absence of "just cause," which includes dishonesty. Like other UPS feeder drivers under union contract, Mowry was paid by the hour.

Mowry had a history of being disciplined for failing to comply with UPS polices and procedures. UPS had previously warned or suspended him for: failing to properly check the trailers he was pulling, attendance problems and irregularities in reporting his time, improperly removing an onboard computer from his truck, violating Department of Transportation limitations on weekly maximum work hours, and failing to notify dispatch when he was delayed on routes. Mowry had also been terminated on at least one

occasion, and lost his seniority on another, due to these performance problems. Each time, however, the sanctions imposed against him were reduced to suspensions through the union's grievance process. Relevant to this appeal, Mowry received a written warning memo in early October 2001 instructing him that "if [he] should ever find [him]self delayed for more than 15 minutes for any reason [he must] notify dispatch as to the reason immediately without exception." He was also warned that any failure to comply with that directive "may result in formal discipline at the appropriate level."

On the night of April 26 and the morning of April 27, 2002, Mowry drove his regular round-trip route between Commerce City, Colorado, and Rawlins, Wyoming. The feeder division manager at that time, Gregg Ford, suspected that Mowry was falsifying his time and trip records. Without Mowry's knowledge, Ford sent two UPS supervisors to follow Mowry on the trip. On the return leg of the journey, Mowry was pulling two empty tandem trailers back to Commerce City. At around 2:15 a.m., between Rawlins and Laramie, he encountered a wrecked semitrailer stretched across the interstate highway and maneuvered around it. Shortly thereafter, he stopped his truck at the Wagonhound rest area, where he remained for almost four hours.[1]

The parties dispute the reasons for Mowry's stop at Wagonhound. According to Mowry, he stopped because of inclement weather and the resulting hazardous road conditions. Noting the jack-knifed truck just outside the rest area, he claims that wind, snow, ice, and heavy fog made it too dangerous to operate a semitrailer until

conditions improved. At the time he chose to stop, Mowry observed that there was black ice on the road, and that the rest area was full of other semitrailers.

Like all UPS trucks, the vehicle Mowry was driving that night was equipped with an onboard computer. This device records such things as truck speeds and employee working hours, and allows drivers to report the status of their trip by entering predesignated codes. Because the system did not have a code to indicate a stop based on impassable road conditions, Mowry entered a code for a "breakdown on road." He did not, however, call the UPS dispatch office in Commerce City to report his delay, despite the requirement that he do so if he experienced any delay longer than 15 minutes, and despite the presence of a pay phone inside the Wagonhound rest area.[2]

The UPS supervisors following Mowry, Rick Durante and Ron Blake (both former feeder drivers), each acknowledged during discovery that there was a jackknifed truck just outside of the Wagonhound rest area, but stated that the weather was not severe enough to warrant pulling off the road. They further indicated that although the road was slushy and wet from a recent storm, other trucks were proceeding along the interstate highway in both directions at the time Mowry stopped, and that their own vehicle had no trouble driving behind Mowry's UPS semitrailer. The two supervisors concluded that Mowry was making an unauthorized stop. At approximately 6:00 a.m. that same morning, Mowry recommenced his return trip to Commerce City, arriving at the main UPS terminal around 9:00 a.m. on Saturday, April 27. No other employees were present, as the dispatch office was

staffed only until 6:00 or 6:30 a.m. on Saturday mornings.

At some point before Mowry returned to work the following Monday, Ford reviewed Mowry's time card from the trip, which indicated that Mowry had arrived in Commerce City a few minutes after 9:00 a.m. and had checked out approximately 40 minutes later. Ford spoke with Durante and Blake, who relayed to him their observation that the road was passable when Mowry stopped at Wagonhound. He also reviewed the tachometer printout from the onboard computer in Mowry's truck. That report showed that Mowry traveled at normal speeds--up to 70 miles per hour--for most of the return leg of the trip, including before and after his stop at Wagonhound. Ford further noted that Mowry had removed his timecard from the onboard computer two or three times during the trip, which prevented the system from capturing complete information about the journey, and that Mowry had entered the code "breakdown on road" for roughly the period of time he remained at the rest area. According to Ford, his review led him to conclude that Mowry had been dishonest in reporting the reasons for his stop and had stolen time from the company.[3] Because drivers are entitled to an unpaid one-hour meal break on each trip, and Mowry stopped for about 3 hours and 45 minutes, the time stolen was believed to be 2 hours and 45 minutes.

When Mowry returned to work the following Monday, Ford called him into his office at the beginning of the shift and discharged him for dishonesty. Ford did not question Mowry about the incident at Wagonhound. Nor did Mowry attempt to offer an explanation at the

time Ford fired him. Later the same day, however, Mowry filed a grievance with the union, claiming that he had stopped at Wagonhound to wait out a storm that caused adverse road conditions, including high winds, fog, ice, and snow.

In accordance with the CBA, Mowry received a grievance hearing before a committee of union and management representatives. He rebutted the charge of dishonesty by alleging that he stopped at Wagonhound to avoid violating safety regulations that required him to cease operating a commercial vehicle in hazardous conditions. *See* 49 C.F.R. § 392.14 ("Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions . . . adversely affect visibility or traction. . . . If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued . . . ."); *see also* 4 Colo. Code Regs. § 723-6 Par. 6102(a)(I) (incorporating by reference 49 C.F.R. Part 392 as a Colorado state regulation). The grievance panel ultimately upheld Ford's decision to discharge Mowry for dishonesty.

Following the failure of his union appeal, Mowry filed suit against UPS in Colorado state court, challenging the termination of his employment on three separate grounds: (1) wrongful discharge in violation of public policy, (2) shorted wages, and (3) intentional infliction of emotional distress. With respect to the first claim, he again asserted that continuing his journey on the morning of April 27, 2002, would have caused him to violate safety regulations, and that he was therefore terminated in violation of public policy. UPS removed the suit to federal court on diversity of citizenship

grounds, and moved to have the case dismissed on the basis that Mowry's claims were preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. The district court agreed and dismissed Mowry's claims.

On initial appeal to this court, we affirmed the district court's judgment in part and reversed in part. *Mowry v. United Parcel Serv. ("Mowry I")*, 415 F.3d 1149 (10th Cir. 2005). Specifically, we affirmed the dismissal of Mowry's claims based on shorted wages and intentional infliction of emotional distress, concluding that these claims were "inextricably intertwined" with the parties' CBA and thus preempted by § 301 of the LMRA. *Id.* at 1157-58. Applying the analysis articulated in *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988), however, we reversed the district court's dismissal of Mowry's claim for wrongful discharge in violation of public policy, holding that it was not preempted by § 301. *See Mowry* I, 415 F.3d at 1152-57. The case was remanded for further proceedings consistent with our decision. *Id.* at 1158.

On remand, and after full discovery on Mowry's public policy claim, the district court granted summary judgment to UPS. It concluded that Mowry had failed to raise a genuine issue of material fact as to whether Ford was aware or should have been aware, at the time of his decision to terminate Mowry, that Mowry reasonably believed he was required to stop operating his semitrailer due to weather conditions. Mowry now timely appeals from that adverse decision.

II

Mowry raises only one issue on appeal. He disputes the district court's conclusion that he failed to create a genuine issue of material fact on the question of whether Ford knew, or reasonably should have known, that Mowry believed he was required by law to cease driving his vehicle at Wagonhound. We review the district court's grant of summary judgment de novo, applying the same legal standard as the district court. *MediaNews Group, Inc. v. McCarthey*, 494 F.3d 1254, 1260 (10th Cir. 2007). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We construe the factual record, and all reasonable inferences derived therefrom, in the light most favorable to Mowry, the non-moving party. *See Rost v. Steamboat Springs* RE-2 Sch. Dist., 511 F.3d 1114, 1119 (10th Cir. 2008). Because we are sitting in diversity, we apply the substantive law of the forum state. *Meyers v. Ideal Basic Indus., Inc.*, 940 F.2d 1379, 1382 (10th Cir. 1991). There is no dispute that Colorado law governs in this case.

To avoid summary judgment on his claim of wrongful discharge in violation of public policy, Mowry was required to adduce sufficient evidence to create a genuine issue of material fact on each element of the tort. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). In other words, his failure to show a genuine dispute of material fact on any one of the necessary elements of his claim is fatal to his case. *Id.* In *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992), the Colorado Supreme Court first recognized the tort of wrongful discharge in violation of public policy,

and outlined the four elements necessary for establishing such a claim. It stated that to prove a prima facie case of this tort, an employee must show:

> [1] that the employer directed the employee to perform an illegal act as part of the employee's work related duties . . . ; [2] that the action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee's basic responsibility as a citizen . . . ; [3] that the employee was terminated as the result of refusing to perform the act directed by the employer . . . ; [and] [4] that the employer was aware, or reasonably should have been aware, that the employee's refusal to comply with the employer's order or directive was based on the employee's reasonable belief that the action ordered by the employer was illegal . . . .

Id. at 109.

Mowry has failed to satisfy his burden at summary judgment of coming forward with any evidence in support of the fourth element.[4] There is no evidence in the record demonstrating that Ford knew or should have known, *at the time he terminated Mowry*, that Mowry's decision to stop driving on the night in question was based on a reasonable belief that he would violate federal and state regulations by continuing his journey.[5] *See id.* at 110 (requiring that an employer receive "fair notice, *prior to the discharge decision*, of circumstances supportive of the employee's reasonable

belief that the action directed by the employer" violates public policy (emphasis added)).

A

We begin with the question of Ford's actual knowledge. Durante and Blake reported to Ford that they did not consider the road conditions to be hazardous. Rather, they stated that the road was merely slushy and wet and that traffic was flowing normally in both directions at the time Mowry stopped.[6] Furthermore, the tachometer report of the trip indicated that, rather than slowing down in response to increasingly adverse conditions, Mowry's truck maintained a relatively constant speed before and after the stop. Specifically, the report showed that the truck had traveled at an average speed of 55 to 65 miles per hour both before and after the stop at Wagonhound, that Mowry passed the accident near Wagonhound at a fairly rapid rate of speed, and that his truck reached speeds of 70 miles per hour following his departure from the rest area. Mowry also did not call the dispatch office to explain the delay, either at the time he experienced the delay or once he resumed his journey. Ford thus had no actual knowledge of the reason for Mowry's stop.

Mowry does not dispute these facts. To be sure, he admitted that nobody at UPS was actually aware at the time of his termination that he stopped at Wagonhound due to hazardous weather conditions. He simply had not told anyone of the incident before Ford fired him. Mowry does, however, advance a legal argument in support of his actual knowledge contention. He encourages us to impute Durante and Blake's alleged knowledge of the adverse road conditions--and thus

knowledge of Mowry's reasonable belief that continuing to drive would have been unlawful--to UPS as a whole. Because those supervisors observed the same hazardous road conditions that Mowry did, and because we must accept his description of those road conditions at the summary judgment stage, he argues that UPS knew the road was dangerous. But in advancing this argument, Mowry fails to cite any authority from the Colorado courts indicating that the knowledge element of a *Lorenz* tort can be satisfied by the knowledge of the corporation as a whole, rather than that of the individual decisionmaker who made the termination decision. The only case he does cite in support of his legal contention--a federal trademark case--merely sets forth the general principle of agency law that a corporation is charged with the knowledge of its employees. *See W. Diversified Servs., Inc. v. Hyundai Motor Am., Inc.*, 427 F.3d 1269, 1276 (10th Cir. 2005). As we view the matter, the dearth of authority presented, particularly applicable state authority, demonstrates "either that there is no authority to sustain [Mowry's] position or that [he] expects the court to do [his] research." *Rapid Transit Lines, Inc. v. Wichita Developers, Inc.*, 435 F.2d 850, 852 (10th Cir. 1970). Given that there is precedent in related contexts that appears to be contrary to his position, we decline to countenance his inadequately developed argument. *See, e.g., Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1290 (10th Cir. 2007) (refusing to impute a subordinate's alleged retaliatory intent to a decisionmaker in evaluating whether the plaintiff had created a genuine issue of material fact on the existence of a casual connection between the plaintiff's attempted exercise of FMLA rights and the decisionmaker's termination of the plaintiff's employment); *see also*

Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1231-32 (10th Cir. 2000).

B

Failing to discern any genuine issue of material fact as to whether Ford had actual knowledge of Mowry's claim, we next consider whether Mowry has shown that Ford *should have known* that Mowry reasonably believed he was required by law to stop. Mowry urges that Ford should have known of the adverse conditions because he reviewed the data from the onboard computer in Mowry's truck, which indicated that Mowry had input the code "breakdown on road." We conclude, however, that neither this piece of information, nor any of the other information available to Ford prior to Mowry's termination, sufficiently suggested adverse road conditions such that Ford should have been aware that Mowry reasonably believed that he was legally obligated to stop his vehicle.

Four undisputed facts are instructive. First, the tachometer report from Mowry's truck showed that Mowry maintained normal travel speeds both before and after he stopped at Wagonhound. This provides an objective inference that the road conditions did not prevent driving at normal speeds. Second, although the two supervisors told Ford that there was a jack-knifed semitrailer on the interstate immediately before Mowry stopped, they did not state that the accident was caused by the weather or hazardous road conditions. In fact, both supervisors indicated that Mowry was able to move around the accident with relative ease. Third, the code "breakdown on road" was not sufficient to allow

Ford to deduce that Mowry stopped due to adverse road conditions. Any number of reasons--legitimate or otherwise--could have prompted Mowry to enter the code, and Ford would therefore have been unable to determine that Mowry stopped due to hazardous roads by virtue of that code alone. Finally, Mowry never called to notify UPS dispatch that he was going to be delayed, as Ford would reasonably have expected him to do if he encountered bad weather--particularly because Mowry had received a written notice instructing him to report such delays "without exception." Ford consequently had no reason to be aware that Mowry was delayed as a result of hazardous road conditions.

C

Mowry raises a final argument based on policy. He contends that UPS should not have been able to terminate his employment before providing him with an opportunity to explain his actions. On this score, Mowry reasons that because Ford allegedly failed to give him an occasion to convey the reasons for which he stopped, and because he was not aware that Ford was considering firing him, it would be manifestly unjust to leave him without a remedy on the basis that Ford was not aware of his protected actions. To do so, he claims, would allow employers such as UPS to avoid liability for the tort of wrongful discharge in violation of public policy by virtue of ignorance alone.

Mowry's argument is neither consistent with the Colorado Supreme Court's decision in *Lorenz*, nor with the facts presented in this case. In *Lorenz*, the court unambiguously recognized that the cause of action at

issue is not available unless the employer was aware or should have been aware of the protected action prior to its decision to terminate the employee. Two primary rationales guided the court in imposing this requirement. First, the element is designed to provide an "employer with a *fair opportunity* to distinguish between the conscientious employee concerned about the legality of particular conduct demanded by the employer and the employee that refuses to carry out an order or directive . . . out of insubordination or some improper motive." *Id.* at 110 (emphasis added). Second, the knowledge element "provide[s] the employer with *fair notice*, prior to the discharge decision, of circumstances supportive of the employee's reasonable belief that the action directed by the employer would be manifestly illegal, [or] would be contrary to the employee's duty as a citizen . . . ." *Id.* (emphasis added). Were Mowry's argument accepted as a matter of law, it would undercut these twin rationales by allowing a cause of action to proceed even where an employer lacked the essential fair notice and fair opportunity to make an appropriate employment decision. That is not the law of Colorado.

The contention advanced is also belied by the undisputed facts. Viewing the evidence in the light most favorable to Mowry, it is undisputed that he had a cellular phone on the night in question, and that UPS policy required him to report any delay in his route of greater than 15 minutes "*without exception.*" Mowry simply never availed himself of the opportunity to report his delay. Although Mowry asserts that his cellular phone had no reception at Wagonhound, he does not dispute that he could have used his cellular phone after he resumed his journey at 6:00 a.m. to call

the dispatch office or, at a minimum, leave a message explaining why he was delayed. He also could have taken other steps to inform UPS of his delay and the reasons for it, including by reporting the incident in written form when he returned to Commerce City on the morning of April 27, or by otherwise seeking out a pay phone at some point during the return trip. But the record unambiguously reveals that he did not attempt to inform Ford, or anyone at UPS, of his reasons for the stop prior to his discharge. In short, Mowry's argument that he never had an opportunity to explain why he stopped on the night in question is contradicted by the undisputed facts in the record.

III

For the foregoing reasons, we AFFIRM the judgment of the district court.

ENTERED FOR THE COURT

Carlos F. Lucero

Circuit Judge

Footnotes

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 32.1.

1The Wagonhound rest area is located off of Interstate 80, approximately 50 miles west of Laramie, Wyoming.

2Mowry alleged that he was unaware of the pay phone and that, although he had a cellular phone on his person, he did not have cellular service at the rest area. At the summary judgment stage of proceedings, we accept as true his version of the facts.

3Ford had reason to believe that Mowry had acted similarly on at least one prior occasion. He had sent Durante to follow Mowry along the same route on April 22 to 23. On that night, Durante observed that Mowry stopped during his return trip to Commerce City at a highway-off ramp and turned his lights off for approximately three hours. Durante stated that the roads on the evening in question were clear, and that there was no obvious reason for the stop. Mowry did not call the dispatch office to advise of this delay, and reports from that trip indicate that Mowry entered the system code for "breakdown on road" for the period of time his truck was not moving. Mowry also did not report any mechanical problems or explain the delay to his supervisors when he returned to Commerce City. He reported all of the time from that trip, including the time he was stopped, as working time.

4Because we resolve the issue on the fourth element of the claimed tort, we express no opinion on whether the factual record provides support for any of the remaining three elements.

5UPS argues that we may affirm the district court on the alternative basis that Mowry, a union employee protected from termination by the provisions of the

CBA, has no cause of action for public policy discharge under Colorado law. UPS contends that because the Colorado Supreme Court has referred to this tort as an "exception" to the general rule that Colorado employees are employed at will, *see Lorenz*, 823 P.2d at 104 (Colo. 1992), that court has restricted the availability of the tort to at-will employees. Mowry counters that the court has never explicitly denied the cause of action to a union employee, and likely would not do so, and that in any event we implicitly decided this question in his favor in *Mowry I*.

Our duty as a federal court sitting in diversity is generally to predict how the state supreme court would rule on an unsettled question of state law presented to us. *See, e.g., Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 866 (10th Cir. 2003). Because Mowry's claim would fail even if the Colorado Supreme Court extended the tort to cover employees protected from termination by a CBA, however, we need not decide the question urged upon us by UPS. Moreover, we note that we did not settle this question in *Mowry I*, where we reached only the issue of whether Mowry's claims were preempted. 415 F.3d at 1150, 1157. Our decision did not require us to address--by implication or otherwise--the subsidiary question of whether a union employee such as Mowry can properly assert a cause of action under the tort at issue. *See id.* at 1152-57.

6Accepting, as we must, Mowry's description of the road conditions, we nonetheless recognize that there is no dispute in the record that Durante and Blake *reported to Ford* that the road was passable and merely slushy.

Civil Action No. 03-cv-02307-RPM
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STANLEY C. MOWRY, Plaintiff,
v.
UNITED PARCEL SERVICE, INC., Defendant.

March 5, 2007, Decided
March 5, 2007, Filed

JUDGES: Richard P. Matsch, Senior District Judge.

MEMORANDUM OPINION AND ORDER
GRANTING SUMMARY JUDGMENT

The plaintiff's claim in this case is that in summarily discharging him from his employment as a driver for United Parcel Service, Inc., ("UPS"), his supervisor, Gregg Ford committed the tort of wrongful discharge in violation of public policy as recognized in the common law of Colorado. That claim for relief was created by the Colorado Supreme Court in *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992):

> ...Applying the public-policy exception to these situations is entirely consistent with its underlying rationale, which is to prohibit an employer from placing an employee in the position of keeping a job only by performing an illegal act, foresaking a public duty, or foregoing a job-related right or privilege. An at-will employee, therefore, will establish a *prima facie* case for wrongful discharge under the public-policy exception if the employee presents

> evidence on the following elements: that the employer directed the employee to perform an illegal act as part of the employee's work related duties or prohibited the employee from performing a public duty or exercising an important job-related right or privilege; that the action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee's basic responsibility as a citizen or the employee's right or privilege as a worker; and that the employee was terminated as the result of refusing to perform the act directed by the employer. To these elements we add the additional requirement that the employee present evidence showing that the employer was aware, or reasonably should have been aware, that the employee's refusal to comply with the employer's order or directive was based on the employee's reasonable belief that the action ordered by the employer was illegal, contrary to clearly expressed statutory policy relating to the employee's duty as a citizen, or violative of the employee's legal right or privilege as a worker.

Id. at 109.

The elements of a claim for relief under this principle are summarized in the opinion deciding *Rocky Mount. Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 527 (Colo. 1996) as follows:

> ...The elements of a wrongful discharge claim under *Lorenz* can be summarized as follows: (1)

> the employer directed the employee to perform an illegal act as part of the employee's duties; (2) the action directed by the employer would violate a statute or clearly expressed public policy; (3) the employee was terminated as a result of refusing to perform the illegal act; and (4) the employer was aware or should have been aware that the employee's refusal was based upon the employee's reasonable belief that the act was illegal.

The question presented by the defendant's motion for summary judgment, filed on August 24, 2006, is whether after full discovery in this case, Mowry has shown sufficient evidence to support a jury finding on all of these elements. The answer is there is no showing that in making the decision to fire Mowry, Ford was aware of the road conditions that Mowry claims were the cause of his stopping at the Wagon Hound Rest Stop from 2:15 a.m. to 6:00 a.m. on Saturday, April 27, 2002. Mowry contends that he was complying with the federal and Colorado regulatory requirement that if hazardous road conditions caused by snow, ice, sleet, fog, etc., become sufficiently dangerous the operation of a commercial vehicle must be discontinued and not resumed until the vehicle can be safely operated. 49 C.F.R. § 392.14, 4 C.C.R. § 1023-15. The plaintiff also cites the provision of the Surface Transportation Assistance Act, that commercial carrier drivers may cease driving when they have a reasonable apprehension of danger to themselves or to the public because of unsafe driving conditions. 49 U.S.C. § 31105.

There is a factual dispute concerning the road conditions on the highway when Mowry pulled off and

stopped until the time he resumed his travel. On that issue, the plaintiff moved to strike the affidavit of Joe E. McGuire, the son of the deceased attendant at the rest stop concerning road conditions on April 27. While some of the contents of the affidavit are inadmissible, the Court has accepted it for purposes of determining the motion for summary judgment, applying the Rule 56 standards of indulging the plaintiff's efforts to create a triable case. Accordingly, the Court accepts Mowry's description of the road conditions and his decision that the driving conditions were too dangerous for continued operation.

What is lacking in the plaintiff's case is any evidence that Ford knew of those conditions and the plaintiff's reaction to them on Monday morning, April 29, 2002, when he fired Mowry for dishonesty. That discharge was the subject of a union grievance under the Collective Bargaining Agreement governing Mowry's employment and it was affirmed in the grievance process as being consistent with the just cause required under the contract.

UPS has filed an additional motion to dismiss and motion for summary judgment, claiming that the wrongful discharge claim is unavailable to the plaintiff under Colorado law because it is limited to an at-will employee and Mowry had the benefit of the Collective Bargaining Agreement. That is an arguable position but it is rejected because the Tenth Circuit Court of Appeals impliedly rejected it in the opinion deciding the previous appeal in this case. *Mowry v. UPS*, 415 F.3d 1149 (10th Cir. 2005).

The plaintiff has correctly observed that the subjective

knowledge of the supervisor, that is his actual awareness of the employee's assertion that his conduct was necessary to conform to establish public policy, is not determinative. The Colorado Supreme Court has recognized that liability may be shown if the employer reasonably should have been aware of that fact. That may be considered an objective standard of a reasonable supervisor under the same or similar circumstances.

The salient facts surrounding this issue are that Mowry arrived at the Commerce City, Colorado, UPS facility at about 9:00 a.m. on April 27, 2002, when there were no supervisors present. He went home and returned for duty on Monday, April 29, 2002, and it was at that time that Ford terminated Mowry's employment for dishonesty in recording his work time, the basis for his compensation. Ford had checked the record of the trip which included the speeds of the truck; he had also received a report from two supervisors who had followed Mowry on this trip as they had on two previous occasions because of suspicion of the same type of dishonesty and because the plaintiff had a disciplinary record. When Ford confronted Mowry and informed the plaintiff of his termination, Mowry did not offer his excuse and has said in his deposition that he did not have an opportunity to do so.

Giving all of the possible inferences to the plaintiff, there is no evidence to support a finding that at the time of his decision to terminate Mowry's employment Ford knew or should have known that the road conditions Mowry was experiencing were such that he was required to stop and wait for almost three hours before continuing his trip. Thus, there is no evidentiary

support for a finding that UPS compelled Mowry to violate any regulation constituting public policy or that Ford was in any way retaliating against Mowry for his conformance with such public policy. It is therefore

ORDERED that the defendant's motion for summary judgment is granted and the Clerk will enter judgment for the defendant dismissing this civil action and awarding the defendant its costs. The other motions filed by the defendant in this action after remand are denied and the plaintiff's motion to strike the defendant's supplemental disclosure (Doc. # 68) is moot.

DATED: March 5, 2007.

BY THE COURT:

s/Richard P. Matsch, Senior District Judge

Filed 7/2/08
No. 07-1197
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STANLEY C. MOWRY,
Plaintiff-Appellant,
v.
UNITED PARCEL SERVICE, INC.,
Defendant-Appellee.

JUDGES: Before KELLY, LUCERO, and HARTZ, Circuit Judges.

ORDER

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.